DAVID J. ZUGMAN, State Bar No. 190818
BURCHAM & ZUGMAN, A.P.C.
964 Fifth Avenue, Suite 300
San Diego, California 92101
Telephone: (619) 699-5931
Email: dzugman@burchamzugman.com
gburcham@burchamzugman.com

SINGLETON & ASSOCIATES
TERRY SINGLETON, State Bar No. 58316
GERALD SINGLETON, State Bar No. 208783
1950 Fifth Avenue, Suite 200
San Diego, California 92101
Telephone: (619) 239-3225
Facsimile: (619) 702-5592
Email: geraldsingleton73@yahoo.com
terry@terrysingleton.com

Attorneys for Adriana Fernandez

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE MARILYN L. HUFF)

ADRIANA FERNANDEZ, Plaintiff, v. JAMES RAY MORRIS, HAROLD CARTER, RAYMOND LOERA, COUNTY OF IMPERIAL, IMPERIAL COUNTY SHERIFF'S DEPARTMENT, and DOES 1-100, inclusive. Defendants.	Case No. 08-cv-00601-H-JMA **PLAINTIFF'S OPPOSITION TO DEFENDANTS CARTER, LOERA, IMPERIAL COUNTY SHERIFF'S OFFICE, AND IMPERIAL COUNTY'S MOTION TO DISMISS** Date: July 14, 2008 Time: 10:30 a.m. Judge: Hon. Marilyn L. Huff Court: 13

Plaintiff, Adriana Fernandez, by and through her attorneys, hereby files the following Opposition to Defendants' Motion to Dismiss the Complaint brought pursuant to the non-enumerated portion of Federal Rule of Civil Procedure 12(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

FEDERAL RULES

CALIFORNIA STATUTES

CALIFORNIA REGULATIONS

I.

INTRODUCTION

This case arises out of the repeated sexual abuse of Ms. Fernandez and other female inmates by former Deputy Sheriff James Morris.[1] Ms. Fernandez filed a compliant pursuant to 42 U.S.C. Section 1983 against Mr. Morris, then Sheriff Harold Carter, Current Sheriff Raymond Loera, the Imperial County Sheriff's Office, Imperial County, and other Doe Defendants. Ms. Fernandez also alleged 7 other causes of action under state law which are properly before this Court pursuant to the Court's supplemental jurisdiction.

Defendants Carter, Loera, the Imperial County Sheriff's Department, and Imperial County (collectively "Defendants") filed a motion to dismiss Ms. Fernandez's case on a variety of grounds. Defendants' motion to dismiss is mistaken from the outset at it argues that this case is governed under the Prison Litigation Reform Act ("PLRA"). [Mtn. to Dismiss at 5-6]. The PRLA only applies to currently incarcerated plaintiffs. *Page v. Torrey*, 201 F.3d 1136 (9th Cir. 2000). A substantial port of Defendants' motion to dismiss is apropos of nothing. Section 1983 does not have an independent exhaustion requirement. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). In short, the PLRA does not impose any exhaustion bar to Ms. Fernandez's claims and her Section 1983 claim has no exhaustion requirement at all.

Defendants argue that Ms. Fernandez's state law claims are barred because she did not properly exhaust those claims and that the governmental entities have immunity for injuries suffered by prisoners. [Mtn. to Dismiss, at 6-8]. Defendants argue that Ms. Fernandez's claims also fail on the merits because Defendants Carter and Loera (the Sheriffs) have qualified immunity and did not personally participate in the alleged constitutional violations. [Mtn. to Dismiss at 9-11]. With respect to the state law claims, Carter and Loera claim that Ms. Fernandez did not sufficiently exhaust her claim by naming Carter or Loera, that Carter and Loera did not personally commit the state law torts. Further, to the extent that Deputy Sheriff Morris (and other deputies) engaged in sexual misconduct with female inmates, the policies and practices which enabled or deliberately ignored that licentiousness

---

[1] Other deputy sheriffs sexually abused other female inmates.

was part of the immune discretionary decision-making of the Sheriff.

Defendants claim that the California public entities are immune from state law claims regarding prisoner injuries. [Mtn. to Dismiss, at 12]. Defendants also claim that Ms. Fernandez's state law claims are barred for failure to exhaust. [Mtn. to Dismiss, at 12-15].

Defendants argue that Ms. Fernandez's claim under the Bane Civil Rights Act are void for failure of a threat of violence and the putative omission of a private right of action. [Mtn. to Dismiss, at 15-16]. Defendants make a similar claim for the Unruh Civil Rights Act because the County is not a business establishment and that Ms. Fernandez is not part of a protected class. [Mtn. to Dismiss, at 16-17].

Defendants argue that Ms. Fernandez cannot claim false imprisonment because she is an inmate. [Mtn. to Dismiss, at 17].

Finally, Defendants claim that Ms. Fernandez's Section 1983 claims are inadequate. [Mtn. to Dismiss, at 18-21].

II.

EXHAUSTION CLAIMS

A. Factual Disputes

Ms. Fernandez has 3 disputes with Defendants' characterization of the exhaustion issues. First, Defendants claim that Ms. Fernandez did not avail herself to the prison grievance procedure. Ms. Fernandez cannot say whether Lieutenant Cortez's declaration is correct in saying that there was a stack of grievance forms in the main prisoner area because shortly after Deputy Morris began his campaign of sexual bribery and extortion, Ms. Fernandez was placed into solitary confinement.[2] When Ms. Fernandez was in solitary confinement, Deputy Morris was the deputy that took her to recreation and was the Deputy that Ms. Fernandez understood to be in charge of her. Requiring Ms. Fernandez to seek a grievance form from Deputy Morris is obviously futile and prohibitively dangerous to Ms. Fernandez's well-being. Also, because the sexual bribery and extortion of inmates was widespread, it

[2] Ms. Fernandez disputes Defendants' characterization of why she was put into solitary confinement, but because the reason why Ms. Fernandez was in solitary confinement does not pertain to her causes of action, she will not pursue the point.

was untenable to require Ms. Fernandez to file a grievance form which would endanger her physical safety from deputy and inmate alike.

Once Ms. Fernandez was transferred to San Diego to the Geo facility in San Diego, she requested grievance forms from the Imperial County Jail, but was told that they were unavailable.[3]

Defendants have 2 further arguments. First, that Ms. Fernandez did not timely file a claim with the County. Second, that her claims did not name Sheriffs Carter or Loera. Regarding the first point, as explained in her petition for a late claim, Ms. Fernandez did send a claim form to the County on September 4, 2007, but heard no response. The attached declaration of David Zugman avers this fact. [Declaration of David Zugman, ¶ ¶ 9, 13]. Regarding the sufficiency of Ms. Fernandez's filings, Ms. Fernandez will address this point after addressing what sort of exhaustion Ms. Fernandez's claims require.

B. Legal Standard for Motions to Dismiss

In deciding a motion to dismiss, the trial court "must accept all factual allegations in the complaint as true." *Tellabs, Inc., v. Maker Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007). The court must also resolve all doubts and inferences in the plaintiff's favor, and view the complaint in the light most favorable to the plaintiff. *Id*; *Atlantic Corp v. Twombly*, 127 S.Ct. 1955, 1965 (2007); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 170-171 (2005). The burden of proving that plaintiff has submitted a complaint for which no relief may be granted rests with the defendant. A complaint may not be dismissed simply because the trial court does not believe the allegations contained in the complaint, or that recovery is unlikely. *See Atlantic Corp*, 127 S.Ct. at 1965.

C. The PLRA Does Not Apply

The Prison Litigation Reform Act ("PLRA") applies only to suits brought by "a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a) (emphasis added). California Code of Regulations, Title 15, section 3084.1(a) states that it applies to "inmate[s]" and

---

[3] This is sworn to in David Zugman's declaration as he personally participated in this process. [Declaration of David Zugman, ¶¶ 6-8]. Should the Court desire a declaration from Ms. Fernandez, she will provide one. She is currently in drug treatment as a condition of her supervised release so Counsel currently has limited access to Ms. Fernandez.

"parolee[s] under the department's jurisdiction". The Ninth Circuit holds that ex-prisoners are not "prisoners" within the meaning of the PLRA:

> [T]he natural reading of the text [of the PLRA] is that to fall within the definition of 'prisoner,' the individual in question must be currently detained as a result of accusation, conviction, or sentence for a criminal offense . . . Therefore, we hold that individuals who, at the time they seek to file their civil actions, are detained as a result of being accused of, convicted of, or sentenced for criminal offenses are "prisoners" within the definition of 28 U.S.C. § 1997e and 42 U.S.C. § 1915.

Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000)

Here, Plaintiff was released from the custody of the Bureau of Prisons on March 15, 2008. (Plaintiff's Declaration, ¶ 1.) Plaintiff filed her Complaint on April 2, 2008. (Declaration of Attorney David J. Zugman, ¶ 2.) Accordingly, Plaintiff is not a "prisoner" within the meaning of the PLRA, and the PLRA's exhaustion requirements do not restrict Plaintiff's ability to bring the instant suit.

Defendants cannot and do not dispute the fact that Plaintiff was released from custody prior to filing her Complaint, nor do they provide any case law which contradicts the Ninth Circuit's clear and unequivocal holding that ex-prisoners, like Plaintiff, are not subject to the PLRA's exhaustion requirements. *See Page*, 201 F.3d at 1139.

D. This Motion is Improper

Defendants cite *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), for the proposition that a motion to dismiss is the proper vehicle for the Court to dismiss unexhausted PLRA cases. [Mtn. to Dismiss, at 6]. *Wyatt* does not apply because this is not a PLRA case. Moreover, *Wyatt v. Terhune* has been overruled *sub silencio* as recognized in *Bryant v. Sacramento County Jail*, 2008 U.S. Dist. LEXIS 10273, **7-8 (Cal CD, February 12, 2008):

> Defendants seek dismissal under Rule 12(b) of the Federal Rules of Civil Procedure. While the Ninth Circuit has stated that Rule 12(b) is the proper mechanism for resolving questions arising under 42 U.S.C.§ 1997e(a), *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), the reason underlying that decision has been undermined. The Ninth Circuit found that failure to exhaust was a matter in abatement which should be raised in a motion made under "unenumerated Rule 12(b)." [2] *Wyatt*, 315 F.3d at 1119. However, the United States Supreme Court recently clarified that failure to exhaust is an affirmative defense which defendant has the burden of pleading and proving. *Jones v. Bock*, U.S. , 127 S.Ct. 910, 921, 166 L. Ed. 2d 798 (2007). Federal courts appropriately consider affirmative defenses on summary judgment. Here, defendant's motion necessarily requires the court to consider the affidavits and exhibits presented for the purpose of proving the absence of exhaustion. Accordingly, the court finds that a motion for

summary judgment is the proper mechanism for resolving the question of whether plaintiff satisfied the exhaustion requirement.

Defendants' motions should be considered via a motion for summary judgment and then denied under that procedural vehicle.

E. Ms. Fernandez's Efforts at Exhaustion Were Timely

Defendants argue that Ms. Fernandez's claims should be barred because she did not bring them in a timely fashion. Ms. Fernandez did submit a timely claim as of September 4, 2007, but never received a response from the Claims Board which is why she submitted a second claim with a petition for a late claim detailing that fact. [Declaration of David Zugman, ¶¶ 9-13]. Under Government Code Section 911.6(b)(1) the Board is required to allow a late claim when "The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2." Ms. Fernandez sent the claim by mail to the Board, but never heard back which is what prompted her to seek a late claim. There is no allegation that the public entity was prejudiced by any delay so this would squarely fit into the excusable neglect/inadvertence rubric.[4]

This Court is empowered to decide whether Ms. Fernandez substantially complied with the Claim procedure. Cal. Gov. Code Section 946.6. Because Ms. Fernandez filed both a timely claim on September 4, 2007, and a petition for a late claim after she heard no response (which recited the pertinent facts), Ms. Fernandez's claim is timely.

F. The Sufficiency of Ms. Fernandez's Claim

Defendants claim that Ms. Fernandez's state law claims should be barred because she did not name Defendants Carter and Loera as putatively required under California Gov. Code Section 910(e).[5]

---

[4] On Page 13 of the Motion to Dismiss, Defendants claim that Ms. Fernandez did not allege in her complaint that her claim to the Government Claims Board was timely. In her petition to file a late claim and in the declaration of David Zugman, Ms. Fernandez states that she sent her claim to the Board on September 4, 2007. Because September 4, 2007 is within 6 months of Ms. Fernandez's late March to early April abuse by Deputy Morris, her claim was within the 6 month timeliness period.

[5] Government Code Section 910 does not apply to Section 1983 actions. *Toscano v. County of Los Angeles*, 92 Cal. App. 3d 775 (Cal. App. 2d Dist. 1979)

Defendants overstate California's requirements for the presentation of claims. *See Scruggs v. Haynes*, 252 Cal. App. 2d 256 (Cal. App. 1st Dist. 1967) (claim for damages arising from assault and battery committed by a police officer employed by defendant city complied with the applicable statutes in all respects where, though it was directed to defendant officer and a fellow police officer rather than to the city, it contained all the information required by the statutes and was signed by the claimant.) Government Code Section 910 requires Ms. Fernandez to identify the person causing her injury which she did: Deputy Morris. It did not require her to identify every person that aided and abetted, enabled and allowed, or failed to restrain Deputy Morris from engaging in his rapacious behavior.

Ms. Fernandez also provided a claim to the Imperial County Sheriff's Office detailing what had happened to her. Assuming that Defendants are correct that there is no difference between Imperial County and the Imperial County Sheriff's Department. [Mtn. to Dismiss, at 21]. This demonstrates that Ms. Fernandez was not dilatory or incomplete in her efforts at alerting the County to the nature of her claim and enabling the County to take measures to investigate the wrong-doer and compensate the victims.

Government Code Section 910 requires substantial compliance. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 456 (Cal. 1974). Substantial compliance occurs so long as the plaintiff alleges all of the statutory elements in Section 910. In *City of San Jose*, the Court held that for a class action to be maintained it was not required that each class member fill out a Government Claim form, but simply that the class itself have one. *Id.* at 457. So long as there is some compliance with the purpose of Section of 910, the question for this Court becomes "Is there sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit?" *Id.* at 456. Plainly, the averments of Ms. Fernandez allowed the County to investigate the sexual misconduct at the Imperial County Jail and to settle it short of a lawsuit.

Finally, Ms. Fernandez's claim is not barred so long as the claim she presented put the "public entity on notice both that the claimant is attempting to file a valid claim and that litigation will result if the matter is not resolved." *Del Real v. City of Riverside*, 95 Cal. App. 4th 761, 769 (Cal. App. 4th

Dist. 2002) (citations omitted).[6]

III.

IMMUNITY CLAIMS

A. Qualified Immunity Does Not Apply

To determine whether qualified immunity applies, the threshold question is whether, in the light most favorable to the party asserting injury, the facts show an officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was violated, immunity attaches and the inquiry ends. *Id.* If a constitutional right would have been violated were a plaintiff's allegations established, the next step is to ask whether the right was clearly established in light of the context of the case. *Id.* Finally, the contours of the right must be clear enough that a reasonable officer would understand whether his or her acts violate that right. *Id.* at 202.

Defendants claim that Sheriffs Loera and Carter cannot be personally liable under section 1983 because they are entitled to qualified immunity, and because they did not personally participate in the alleged constitutional violations. [Mot. To Dismiss, at 9-11]. Defendants assert that because Plaintiff's complaint sets forth only conclusory allegations and Defendants Loera and Carter were unaware of Morris' actions, neither Defendant engaged in conduct that violated Plaintiff's constitutional rights. Defendants also assert that the claims against Defendants Loera and Carter must be dismissed because they are based entirely on their titles and general abilities to control employees, and that Plaintiff has not alleged facts to show Defendants Loera or Carter were personally involved in the deprivation of Plaintiff's constitutional rights. [Mot. to Dismiss, at 10-11].

Neither Defendant Loera or Carter are shielded from personal liability based on the extraordinary facts of this case as set forth in Plaintiff's complaint. Plaintiff has alleged with specificity that Defendants Loera and Carter are personally responsible for the constitutional deprivations suffered

---

[6] The Board did not object that Ms. Fernandez's claim was somehow deficient. *See Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth.*, 48 Cal. App. 4th 524, 532 (Cal. App. 4th Dist. 1996) "If a claim does not substantially comply with Government Code section 910, the governmental board must give notice of the deficiency within 20 days. (Gov. Code, § 910.8.) If the board fails to give notice of the insufficiencies or omissions in a defective claim, the entity waives any defenses as to the sufficiency of the claim. (Gov. Code, § 911.)"

by Plaintiff because they were responsible for the de facto policy and/or custom within ICJ that allowed the sexual abuse of female inmates by male guards, and because their willful deliberate indifference with regard to supervising ICJ guards and employees, training ICJ guards and employees, responding to the abuse that was occurring, and generally satisfying their statutory duties to provide female inmates a safe environment inside ICJ, led to Defendant Morris and other ICJ guards and/or employees violating the constitutional rights of Plaintiff. [Complaint, at 7-8].

As previously set forth, this case is not at all about a single, isolated incident of misconduct by one officer (Morris) within ICJ. Were this the case, Defendants Loera and Carter indeed might be entitled to qualified immunity. To the contrary, what existed here was a jail environment that, over a lengthy period of time, was replete with sexual abuse of multiple female inmates by multiple male guards, all done in a conspicuous manner and known to other inmates and guards and/or employees while it was occurring. [Complaint, at 6]. Under the extraordinary and disturbing facts of this case, Defendants Loera and Carter, who are alleged to have been a cause of the misconduct of Morris and other guards and/or ICJ employees through their de facto policy and/or custom allowing such conduct and through their willful deliberate indifference to the rights of Plaintiff, cannot be protected by qualified immunity.

There can be no doubt that Defendant Morris, who has admitted to having sexual relations with Plaintiff and at least two other ICJ female inmates, is not entitled to qualified immunity. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000)(where guards themselves are responsible for the rape and sexual abuse of inmates, an act which is "deeply offensive to human dignity," qualified immunity offers no shield). Defendants Loera and Carter's attempt to shield themselves from liability through qualified immunity is likewise unavailing. A supervisor may be liable if there exists a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Redman v. County of San Diego*, 942 F.3d 1435, 1446 (9th Cir. 1991)(en banc). "Supervisory liability exists even without the overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is the 'moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)(quoting *Thomkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987)).

Plaintiff specifically alleged in her complaint that Defendants Loera and Carter were responsible for the de facto policy and/or custom that allowed Morris and other ICJ guards to sexually abuse female inmates. Plaintiff alleged that this de facto policy and/or custom is exemplified by Defendants Loera and Carter's failure to supervise the ICJ guards and/or employees who were guarding these females and committing these abusive acts, their failure to train ICJ guards and/or employees to prevent this sort of sexual abuse, their failure to respond to this abuse when it was obvious that it was occurring, and their overall failure to exercise any meaningful control over this jail that they were charged by state law to keep. *See* Cal. Gov. Code § 26610, Cal. Penal Code § 4606, *Brandt v. Board of Supervisors*, 84 Cal. App. 3d 601 (1987); [Comp. at 6-8].

Plaintiff also alleged that Defendants are personally responsible because their failure to supervise and train the ICJ guards and/or employees in a manner so as to avoid this misconduct caused the constitutional violations set forth herein and was so inadequate that it represents their deliberate indifference to the rights of Plaintiff. A pretrial detainee establishes a violation of the constitutional right to personal security by demonstrating either that prison officials acted with deliberate indifference or that their conduct was so reckless as to be tantamount to a desire to inflict harm. *Ford v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002). A finding of deliberate indifference necessarily precludes a finding of qualified immunity. *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992). The Ninth Circuit had held that a constitutional violation may arise from training or supervision where the training or supervision is sufficiently inadequate as to constitute deliberate indifference to the rights of the persons affected. *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989). The "shield that qualified immunity provides is limited to those officials who are either unaware of the risk or who take reasonable measures to counter it," *Schwenk*, 204 F.3d at 1197.

Plaintiff alleged that Defendants Loera and Carter were deliberatively indifferent to Plaintiff's constitutional rights by failing to supervise and train ICJ guards and/or employees so that females inmates, who Defendants Loera and Carter knew were guarded by males, were not sexually exploited by these male guards. Plaintiff also specifically pled that these Defendants were on actual or constructive notice that these omissions --their failure to supervise and train their ICJ guards and/or employees in relation to handling female inmates -- would likely result in a constitutional violation.

Plaintiff further alleged that Defendants Loera and Carter failed to respond to these illegal and unconstitutional acts once they were known to be occurring, including attempting to conceal this behavior. These allegations which are presumed true for this motion and if proven at trial would establish personal liability for Defendants Loera and Carter because of their deliberate indifference to the rights of Plaintiff.

The Ninth Circuit's decision in *Redman* supports Plaintiff's position as to Defendants Loera and Carter. Plaintiff in *Redman* alleged that the San Diego County Sheriff was liable for sexual assaults upon him by other inmates because the Sheriff allowed the county jail to be overcrowded which required prisoners to be placed in improper detention areas within the jail. *Id.* at 1447. The Ninth Circuit held that the Sheriff could not invoke qualified immunity, as a reasonable jury could find that the Sheriff was deliberately indifferent to Redman's personal security rights by allowing overcrowding of the jail and that he reasonable should have known of the overcrowding which he approved of and which was a moving force behind the rape of Plaintiff. *Id.*

The instant case presents even a stronger case for Sheriff liability than *Redman*. In *Redman*, the assaults were at the hands of inmates and occurred over the period of just a few days, were limited to one victim, and were alleged to have been caused by the general problem of jail overcrowding which affects jails and prisons throughout the nation. Here, we have sexual assaults that were alleged to be perpetrated by ICJ guards, are alleged to have occurred over a protracted period, are alleged to have involved multiple guards and multiple female victims, and are alleged to have been committed in a conspicuous area and to were well known throughout ICJ to guards and/or employees and inmates. Additionally, Plaintiff alleges that Defendants Loera and Carter were directly responsible for this misconduct by their deliberate indifference to the rights of Plaintiff through their lack of supervision, training, and response to this "deeply offensive," *Schwenk v. Hartford*, 204 F.3d at 1191, environment that existed at ICJ not for days, but for weeks and months. If the en banc Ninth Circuit denied qualified immunity under the facts of Redman, this Court must reach the same decision under the significantly more egregious facts of this case.

In sum, construing all inferences in favor of Plaintiff, *see Meehan v. County of Los Angeles*, 856 F.2d 102, 106 (9th Cir. 1988), a reasonable jury certainly could conclude based on the allegations set

forth in the complaint that Defendants Loera and Carter, the individuals directly responsible for the Plaintiff's safekeeping and in charge of the policies and customs of ICJ, were personally responsible for the de facto policies and/or customs within ICJ that approved of these deprivations of Plaintiff's constitutional rights and that they were deliberately indifferent to the rights of Plaintiff through their omissions. Because numerous genuine issues of material fact exist as to these bases of liability for Defendants Loera or Carter, Defendants' motion to dismiss based on qualified immunity must be denied. If this Court agrees with Defendants that the complaint contains insufficient allegations to establish liability on the part of Defendants Loera or Carter in their individual capacities, Plaintiff would ask for leave to amend her complaint.

B. Carter and Loera are not entitled to "discretionary immunity"

Defendants are not entitled to "discretionary acts" immunity because the acts alleged in plaintiff's complaint (*to wit*, the failure to exercise reasonable care in supervising and controlling the DOE Defendants who caused plaintiff's injury) did not involve planning or policy making decisions but, rather, involved the basic operational functions of government. Accordingly, those acts were "ministerial", not "discretionary", within the meaning of Cal. Govt. Code § 820.2.

Cal. Govt. Code § 820.2 creates "discretionary act immunity" for governmental employees. *See, inter alia, Doe 1 v. City of Murrieta*, 102 Cal.App.4th 899, 911 (2002). The purpose of this immunity is to insulate governmental employees from liability for policy-making level decisions. *City of Murrieta*, 102 Cal.App.4th at 912. Ordinary acts carried out by governmental actors such as routine supervision of subordinate employees are considered "ministerial" and do not fall within the scope of this immunity. *Id.*

As used in Cal. Govt. Code § 820.2, the term "discretionary acts" is a term of art. Accordingly, "'not all acts requiring a public employee to choose among alternatives entail the use of 'discretion' within the meaning of [Government Code] section 820.2.'" *City of Murrieta*, 102 Cal.App.4th at 911 (quoting *Barner v. Leeds,* 24 Cal.4th 676, 684-85 (2000). Indeed, "'it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit some discretion in the manner of its performance, even if it involved only the driving of a nail.'" *City of Murrieta*, 102 Cal.App.4th at

911, quoting *Johnson v. State of California*, 69 Cal.2d 782, 788 (1968) (emphasis added).

In considering where to draw the line between ministerial and discretionary acts, the California Supreme Court drew a distinction between the "planning" and the "operational" functions of government. *Caldwell v. Montoya*, 10 Cal.4th 972, 981 (1995), quoting *Johnson*, 69 Cal.2d at 793-794.) "Immunity is reserved for those 'basic policy decisions [which have] . . . been [expressly] committed to coordinate branches of government' and as to which judicial interference would thus be 'unseemly.'" *Caldwell*, 10 Cal.4th at 981, quoting *Johnson*, 69 Cal.2d at 793 (emphasis added). However, "there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated." *Id.*, (quoting *Johnson*, 69 Cal.2d at 796.

Here, plaintiff alleges that Defendants, in their capacity as the supervisory employees, failed to properly supervise their subordinate employees, including Defendant Morris. Plaintiff's allegations involve Defendants' failure to implement a basic policy that has already been formulated: *to wit*, that supervisory employees must exercise reasonable care in supervising their subordinates. Unless Defendants are claiming that they made a policy decision to the effect that supervisory employees of the Imperial County Sheriff's Office would no longer be responsible for supervising the acts of their subordinates, or that sexual contact between employees of the Department and inmates was permitted, Defendants' are not immune from the instant suit. Accordingly, Defendants act and/or omissions in failing to reasonably supervise and control their subordinate employees, including Defendant Morris, were ministerial acts which are not entitled to immunity under Cal. Govt. Code § 820.2.

Finally, to the extent Defendants argue that they should be granted immunity because they were not personally involved in supervising the DOE Defendants, and/or that they were not informed of the repeated sexual contact between Sheriff's Department employees and inmates at the Imperial County Jail, this is a factual determination which will require additional discovery to confirm or disprove. Accordingly, it should be brought in the form of a motion for summary judgment, and should not be made until after Plaintiff has had the opportunity to conduct discovery and determine exactly what each Defendant (Carter and Loera) knew about the repeated sexual misconduct committed by their subordinate employees at their jail.

State and federal case law on this issue does not support Defendants'position that the failure to adequately supervise a subordinate employee is a policy-making decision which should be entitled to discretionary acts immunity. In *Caldwell v. Montoya*, 10 Cal.4th 972, plaintiff, a school superintendent, sued members of the school board on the grounds that they had violated California's FEHA (Cal. Govt. Code § 12900, *et seq.*) by voting not to renew his contract. *Caldwell*, 10 Cal.4th at 976-77. The Supreme Court noted that the "historical basis [for granting immunity to the discretionary acts of public officials] was that fear of civil lawsuits might deter officials from the zealous and unflinching discharge of their public duties." *Id*. at 979. The Court then held that the school board members were entitled to discretionary immunity for the decision not to retain the school superintendent because "the decision about who should serve as superintendent of a school district" was one of "vital public interest" that had been "'expressly entrusted to a coordinate branch of government' at its highest level." *Id*. at 982-83, quoting *Johnson*, 69 Cal.2d 793. In so doing, the Court made clear that its reasoning was based upon the importance of the position of school superintendent. "The superintendent . . . is the district's foremost appointed official, with primary responsibility for representing, guiding, and administering it. The governing board's choice about who should occupy this crucial post is therefore a peculiarly sensitive and subjective one, with fundamental policy implications." *Id*. at 983 (citations omitted). This decision does not imply that any hiring or retention decision by a public employer is entitled to discretionary immunity; to the contrary, the Court's reasoning indicates that only hiring and retention decisions for very high-level posts would be entitled to immunity. The decision to hire, supervise, retain, and control a prison guard does not meet the requirements set forth in *Caldwell*.

Finally, the case of *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F.Supp. 1369 (N.D. Cal. 1997), also fails to advance Defendants' position. There, this Court held that a school principal was entitled to discretionary immunity for his decisions concerning the appropriate amount punishment for students who were sexually harassing plaintiff. *Id*. at 1389-90. While this case is not binding authority, even if it were, nothing in its language supports the proposition that the supervision of a subordinate employee is anything other than a ministerial act.

C. Defendants do not Enjoy Government Code Section 820.8 Immunity

Defendants Carter and Loera assert that they are immune from suit because they did not

personally participate in Deputy Morris's deviation. This argument is foreclosed by California case law. *Fernelius v. Pierce*, 22 Cal 2d 226 (1943) (Superior having power and duty of removal and negligently failing to discharge known unfit subordinate is liable for torts of subordinate); *see also Marshall v. County of Los Angeles*, 131 Cal. App. 2d 812, 814 (Cal. App. 2d Dist. 1955) Ms. Fernandez is alleging that Carter and Loera were on actual and constructive notice of the continual, repeated, and egregious violations of Ms. Fernandez's and other inmates' rights precisely because of how prevalent, brazen, and open the problem was. Section 820.8 does not immunize in this instance. Finally under California law, government defendants have the burden of proving that the actions of government employees are within the scope of statutory immunity and such "a showing was not and could not have been made by [the defendant] at the demurrer stage," and "it therefore would [have been] error to sustain [the defendant's] demurrer based on Government Code section 820.2" *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1138 (N.D. Cal. 2000) (quotation omitted).

D. The Public Entities are Immune for Prisoner Injuries for The State Law Claims, but Not the Federal Claims

Defendants correctly observe that Cal. Government Code § 844.6(a)(2) holds that a public entity is not liable for any injury to a prisoner. However, this immunity applies only to state statutory law; it does apply to statutory causes of action, particularly those brought pursuant to Title 42 U.S.C. § 1983 ("section 1983").

Plaintiff brings suit against the County of Imperial (and Defendants Carter and Loera, in their official capacities) under the federal civil rights act contained in section 1983. The Supremacy Clause of the United States Constitution long ago established that federal law takes precedence over state law. U.S. Const., Art. VI. Section 1983 contains no immunity provision for public entities in cases where the Plaintiff is a prisoner. Moreover, Defendants cite no case law to support this proposition, and Plaintiff is aware if none.

The two cases cited by Defendants are do not support their position. Indeed, the initial case cited by Defendants, *Wright v. State of California*, 122 Cal.App.4th 659, 671-672 (2004), strongly supports Plaintiff. In *Wright*, the plaintiff filed six causes of action, four based on state law and two based on federal law. *Id* at 663. The state of California demurred to the plaintiff's state causes of

action based upon public entity immunity, but did not demur to his federal causes of action on this basis. *Id* at 664. The court sustained the demurrer to the state causes of action only based upon public entity liability. *Id* at 671-72.

Defendant's second case, *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991), is similarly unavailing. The passage cited by the Defendants stands only for the proposition that, under section 1983, a senior official (such as a police chief or sheriff) may be sued in his or her official capacity; such a suit is tantamount to a suit against the public entity itself. *Id*. Nowhere, however, does *Larez* suggest that a suit brought by a prisoner against a public entity would not be permitted under section 1983. Indeed, such a section would run afoul of the Supremacy Clause, as a state may not enact a law which abrogates or contradicts a law enacted by the federal government.

Accordingly, Defendants' argument is without merit and should be rejected.

IV.

STATE LAW CAUSES OF ACTION

A. Bane Act

Defendants assert that Plaintiff has failed to state a claim against Defendants under the Bane Civil Rights Act (Cal. Civil Code § 52.1, et seq), because she has not "alleged that Morris used violence or threats of violence to interfere with her federal Constitutional rights," and because she has not alleged that Defendants Carter of Loera personally threatened, intimidated, or coerced her into engaging in sexual activity with Morris." [Motion to Dismiss, at 15-16]. Neither argument has merit.

To state a cause of action under section 52.1, there must be either violence or intimidation by threat of violence. *Cabesuela v. Browning-Ferris Industries*, 68 Cal.App.4th 101, 111, 80 Cal.Rptr.2d 60 (1998). Speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed "reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat." Cal. Civil Code § 52.1(j).

At the outset, this Court should note that Defendants incorrectly construe Plaintiff's complaint in their argument. Plaintiff did not allege in her complaint only that Morris controlled her recreation

time in order to force her to have sex with him. While this was one allegation in the complaint and indeed was a tool that Morris employed to sexually abuse Plaintiff, Plaintiff also alleged that Morris made it clear that if she failed to acquiesce to his demands, he would "hurt" her, [Complaint, at 2], and she would receive harsher treatment while in custody. [Complaint, at 5]. The threats made to Plaintiff by Morris were hardly limited to the amount of recreation time she would receive while at ICJ.

Plaintiff pled both violence, and intimation by threat of violence, in her complaint. As to the use of violence, Plaintiff alleged that in order not to be harmed by Morris or to have her time in custody made more punitive by him, she consented to his sexually abuse of her on numerous occasions. While Defendants apparently do not believe that a male prison guard with syphilis who coerces a female inmate into having sexual relations with him on numerous occasions and gives her syphilis does not commit a violent act upon this female, this is not a tenable position. *Cf. United States v. Pereira-Salmeron*, 337 F.3d 1148, 1154 (9th Cir. 2003) (holding that Virginia statute criminalizing an adult having sex with a child under age fifteen was a crime of violence for purposes of the Guidelines even though there was no force required because, quoting *United States v, Velasquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996), such crimes typically are "perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures."); *United States v. Rayo-Valdez*, 302 F.3d 314, 316 (5th Cir. 2002)(holding that sexual abuse of a minor is a crime of violence whether force is used or not).

Additionally, Plaintiff asserted in her complaint that Morris used threats of violence to interfere with her federal Constitutional rights. Plaintiff alleged that Morris told her that unless she agreed to have sex with him (a threat of violence through his sexual abuse of her), he would interfere with her constitutional rights during her stay at ICJ by either harming her and making her stay in custody more difficult. This allegation is sufficient to state a claim under Cal. Civil Code § 52.1, et seq.. Deputy Morris had a position of authority which made voluntary consent by Ms. Fernandez impossible. There is an obvious power imbalance between Deputy Morris and Ms. Fernandez which makes Deputy Morris's advances inherently coercive and should be considered as a threat of violence.

As to Defendants' claim that they are not liable because they personally did not threaten, intimidate, or coerce Plaintiff into having sexual relations with Morris, this argument is of no moment.

As is addressed in the qualified immunity section of this reply, Plaintiff has alleged that Defendants Loera and Carter acted with a deliberate indifference to the constitutional rights of Plaintiff by failing to supervise, failing to train, and failing to control what went on in their jail, and that this indifference caused the sexual abuse alleged herein. Plaintiff also has alleged that these Defendants were responsible for the de facto policy or custom that allowed this sort of treatment of female prisoners by guards at ICJ. If Defendants' qualified immunity arguments are denied by this Court, they also are liable under section 52.1.

B. Unruh Act

Defendants move to dismiss Plaintiff's Unruh Act claim on the ground that the Imperial County Jail is not a "business establishment" within the meaning of Cal. Civil Code § 51. In support of its argument, Defendants cite *Taormina v. Cal. Dept. of Corrections*, 946 F. Supp. 829, 834 (S.D. Cal. 1996), in which Judge Brewster found that a prison does not qualify as a business entity under section 51. *See also Gaston v. Colio*, 883 F. Supp. 508, 509 (S.D. Cal. 1995) (Judge Brewster again concluding that a prison not covered by section 51). Plaintiff respectfully disagrees with the conclusions in *Taormina* and *Colio* and submits that ICJ indeed is a "business establishment" within the meaning of section 51.

In interpreting section 51, the California Court of Appeal has stated that the word "business" embraces everything about which one can be employed, and it is often synonymous with calling, occupation or trade, engaged in for the purpose of making a livelihood or gain. *O'Connor v. Village Green Owners Assoc.*, 33 Cal. 3d 790, 795 (1983). The Court of Appeal agreed that this term was used in the "broadest sense reasonably possible." *Id.* "The Unruh Act covers "all" business establishments 'of every kind whatsoever,' and the Legislature has never added any exemption, exception, or restriction. We are not free to import one from another law." *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 84 (1985).

While Judge Brewster has ruled that "business establishments" do not include a prison because "prisoners are not engaged in a calling, occupation or trade for purposes of making a livelihood or gain," *Taormina*, 946 F. Supp at 834, Plaintiff submits that this is not the proper way to analyze this issue. Instead of looking as to whether inmates are engaged in an occupation or trade within the

insitution where they are held, this Court should look to see if the jail itself is a "business establishment" under section 51. It is. Just like a Boys' Club, *see Isbister*, 40 Cal. 3d at 84, or a homeowners association, *see O'Connor*, 33 Cal. 3d at 795, are considered to be business establishments within the meaning of section 51, so is Imperial County Jail for the employees who work there. While ICJ inmates may not be "engaged in a calling, occupation or trade for purposes of making a livelihood or gain," *Taormina*, 946 F. Supp at 834, there are numerous persons within ICJ who are and ICJ should qualify as a "business establishment" under Cal. Civil Code section 51.

C. False Imprisonment

Ms. Fernandez will not pursue the false imprisonment claims further and consents to the dismissal of the false imprisonment cause of action.

V.

CONCLUSION

For the reasons set forth herein above, Plaintiff respectfully requests that this Court deny Defendant's motion in its entirety for lack of a proper procedural vehicle. If this Court considers the motion, then Ms. Fernandez asks that only her false imprisonment cause of action be dismissed.

Respectfully submitted this 30th day of June, 2008

By: /s/ David Zugman
DAVID ZUGMAN
Burcham & Zugman
Attorneys for Plaintiff

By: /s/ Gerald Singleton
GERALD SINGLETON
Singleton & Associates
Attorneys for Plaintiff

PROOF OF SERVICE

I, the undersigned, declare that:

1. I am over eighteen (18) years of age; am a resident of the County of San Diego, State of California; and my business address is 964 Fifth Avenue, Suite 300, San Diego, California, 92101-5008.

2. I am effecting service of PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION TO DISMISS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

J. Scott Tiedemann
5701 N. West Avenue
Fresno, CA 93711

3. I hereby certify that I have mailed the foregoing, by United States Postal Service to the following non-EFC participants in this case:

1. N/A

to the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2008.

S/David Zugman
DAVID J. ZUGMAN